A

LING HAW CHEUN v. PP

COURT OF APPEAL, KUCHING
MOHD ZAWAWI SALLEH JCA
IDRUS HARUN JCA
ABDUL RAHMAN SEBLI JCA
B [CRIMINAL APPEAL NO: Q-05-109-04-2014]
2 JULY 2015

CRIMINAL LAW: *Dangerous Drugs Act 1952 – Section 39B(1)(a) – Trafficking – Appeal against conviction and sentence – Whether actual possession proved – Defence of no knowledge – Whether there was failure to rebut presumption of knowledge – Failure to call material witness – Adverse inference – Whether ought to be invoked – Whether trial judge thoroughly considered defence explanation – Whether appeal dismissed – Dangerous Drugs Act 1952, s. 37(da)*

C

CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Dangerous drugs – Trafficking – Whether actual possession proved – Defence of no knowledge – Whether there was failure to rebut presumption of knowledge – Failure to call material witness – Adverse inference – Whether ought to be invoked – Whether trial judge thoroughly considered defence explanation – Whether appeal dismissed – Dangerous Drugs Act 1952, s. 37(da)*

D

E The appellant was charged with trafficking in 184.88g of methamphetamine under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). On 25 July 2012, the appellant was seen at the parcel section of Vital Focus Transportation ('VFT') collecting a parcel ('P12'). The appellant was about to reach a car that was parked nearby when PW4 stopped him and introduced
F himself as a police officer. Startled, the appellant threw the box onto the driver's seat of the car. The appellant was detained and handcuffed and his girlfriend, Ofelia, who was sitting in the passenger seat of the car, was also arrested. Administering the statutory caution under s. 37A(1)(b) of the DDA, the appellant and Ofelia were then called to witness the inspection of P12.
G Among the items found in the box was one black plastic bag containing five transparent plastic packets which was confirmed by the forensic science officer to be methamphetamine. The trial judge found that a *prima facie* case of trafficking had been established against the appellant. The appellant, in his defence, submitted that on the morning of his arrest, he had gone out to the bus terminal with Ofelia to collect something belonging to Ofelia's friend by
H the name of 'Ah Kiong.' The appellant did not deny collecting P12 from the terminal but claimed that it was at the request of Ofelia who told him that Ah Kiong had asked her to collect it. The appellant submitted that he had no knowledge of the drug. The appellant was, however, found guilty and sentenced to death. Thus, the appellant appealed. The issues that arose were
I (i) whether the trial judge had erred in finding that knowledge had been proved; (ii) whether the trial judge had erred in failing to draw adverse inference against the prosecution for failing to call Ofelia; and (iii) whether the defence explanation was not 'throughly' considered by the trial judge.

Held (dismissing appeal; affirming conviction and sentence)
Per Abdul Rahman Sebli JCA delivering the judgment of the court:

(1) There was no dispute that the drug was in the appellant's physical custody and control at the time of his arrest. As for knowledge of the thing possessed, the judge's finding was based on inferences from the following acts and conduct of the appellant *ie*, that the appellant had straight away pointed to P12 which was lying on the floor of the VFT counter, had written down his phone number on the record book and had thrown the box on the driver's seat of the car upon being approached by the police. On such evidence, the trial judge was perfectly entitled to arrive at the finding of knowledge. The combined effect of these strands of evidence was that the appellant knew about the drug. As actual possession had been proved against the appellant, the trial judge was therefore correct in invoking the presumption of trafficking under s. 37(da) of the DDA. In fact, the trial judge had no discretion not to do so as the weight of the drug exceeded the minimum prescribed by s. 37(da)(xvi) of the DDA. (paras 24, 25 & 28)

(1)(a) In a drug trafficking charge, clearly knowledge is a necessary factual ingredient of the offence. Without proof of knowledge, there can be no possession in the criminal sense and without proof of possession there can be no trafficking. The defence of no knowledge is a defence that the accused was not even in possession of the drug. The defence had nothing to do with rebutting the presumption of trafficking under s. 37(da) of the DDA. Therefore, where no knowledge is raised as a defence and the accused failed to prove the defence on the balance of probabilities, he must as a matter of law be convicted of the offence charged, which is trafficking. (para 62)

(1)(b) The appellant was called upon to answer a trafficking charge and not a possession charge. His defence must therefore be directed at rebutting the presumption of trafficking rather than to try and convince the court that he was not in possession by reason of having no knowledge of the drug. But since he chose to put up the defence of no knowledge, then he must prove it on the balance of probabilities. If the accused fails to rebut the presumption of knowledge, the question of whether he succeeds in rebutting the presumption of trafficking does not arise at all. (paras 66 & 67)

(2) Unless it could be shown that the prosecution was actuated by oblique motive and was suppressing evidence favourable to the appellant, no adverse inference should be drawn against the prosecution. There was no such suggestion in this case. More importantly, even without the evidence of Ofelia, the prosecution already had sufficient credible

A evidence to establish a *prima facie* case against the appellant at the close of its case. In law, no adverse inference could be drawn against the prosecution for failure to call a witness when the prosecution had discharged its burden. (paras 69 & 70)

B **(3)** There was no substance in the complaint that the trial judge had failed to consider the defence explanation 'thoroughly.' The trial judge had considered with meticulous care every material aspect of the defence explanation. There was therefore no merit in the appellant's appeal. (para 71)

C ***Bahasa Malaysia*** *Translation Of Headnotes*

Perayu telah dituduh mengedar 184.88 gram methamphetamine di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Pada 25 Julai 2012, perayu dilihat berada di bahagian kutipan bungkusan Vital Focus Transportation ('VFT') untuk mengutip bungkusan ('P12'). Perayu sedang
D menuju ke arah sebuah kereta yang terletak berdekatan apabila dia ditahan oleh PW4 yang telah memperkenalkan dirinya sebagai pegawai polis. Perayu terkejut dan terus mencampak kotak tersebut ke atas kerusi pemandu kereta tersebut. Perayu ditahan dan digari dan teman wanitanya, Ofelia, yang sedang duduk di kerusi penumpang kereta tersebut, juga ditahan. Dengan
E pemberian amaran berkanun di bawah s. 37A(1)(b) ADB, perayu dan Ofelia kemudiannya dipanggil untuk menyaksikan pemeriksaan P12. Antara barangan yang ditemui dalam kotak tersebut adalah satu bag plastik hitam yang mengandungi lima bungkusan plastik lutsinar yang disahkan oleh Pegawai Sains Forensik sebagai methamphetamine. Hakim bicara telah mendapati bahawa satu kes *prima facie* pengedaran telah dibuktikan terhadap
F perayu. Perayu, dalam pembelaannya, menghujahkan bahawa pada hari dia ditahan, dia telah ke terminal bas dengan Ofelia untuk mengutip sesuatu yang dimiliki oleh kawan Ofelia yang dikenali sebagai 'Ah Kiong'. Perayu tidak menafikan bahawa dia mengutip P12 daripada terminal tersebut tetapi mendakwa bahawa ia adalah atas permintaan Ofelia yang memberitahunya
G bahawa Ah Kiong telah menyuruhnya berbuat demikian. Perayu menghujahkan bahawa dia tidak mempunyai pengetahuan berkenaan dadah tersebut. Perayu, walau bagaimanapun, telah didapati bersalah dan dihukum mati. Oleh itu, perayu telah merayu. Isu-isu yang dibangkitkan adalah (i) sama ada hakim bicara telah terkhilaf dalam dapatannya bahawa
H pengetahuan telah dibuktikan; (ii) sama ada hakim bicara telah terkhilaf apabila gagal membuat tanggapan bertentangan terhadap pihak pendakwaan kerana gagal memanggil Ofelia; dan (iii) sama ada penjelasan pembelaan tidak dipertimbangkan dengan teliti oleh hakim bicara.

I

Diputuskan (menolak rayuan; mengesahkan sabitan dan hukuman) Oleh Abdul Rahman Sebli HMR menyampaikan penghakiman mahkamah:

(1) Tiada pertikaian bahawa dadah telah dijumpai dalam kawalan dan jagaan fizikal perayu pada masa dia ditahan. Bagi pengetahuan berkenaan barangan yang dalam milikannya, dapatan hakim adalah berdasarkan inferens-inferens dari perbuatan dan perlakuan perayu iaitu bahawa perayu telah dengan serta merta menunjuk kepada P12 yang berada atas lantai kaunter VFT, telah mencatatkan nombor telefonnya di dalam buku rekod dan telah mencampak kotak tersebut ke atas kerusi pemandu kereta setelah didatangi oleh pihak polis. Berdasarkan keterangan tersebut, hakim bicara berhak untuk mencapai keputusan bahawa terdapatnya pengetahuan. Kesan gabungan keterangan ini adalah bahawa perayu berpengetahuan berkenaan dadah tersebut. Oleh kerana milikan telah dibuktikan terhadap perayu, hakim bicara adalah betul dalam mengguna pakai anggapan pengedaran di bawah s. 37(da) ADB. Hakim bicara tidak mempunyai budi bicara untuk tidak berbuat demikian kerana berat dadah melebihi tahap minimum yang ditetapkan oleh s. 37(da)(xvi) ADB.

(1)(a) Dalam pertuduhan pengedaran dadah, secara jelasnya pengetahuan adalah bahan fakta yang diperlukan bagi kesalahan tersebut. Tanpa bukti mengenai pengetahuan, tidak akan ada apa-apa milikan dalam erti kata jenayah dan tanpa bukti milikan maka tiada apa-apa pengedaran. Pembelaan tanpa pengetahuan adalah pembelaan bahawa tertuduh tidak pun memiliki dadah. Pembelaan tidak mempunyai kaitan dengan menyangkal anggapan pengedaran di bawah s. 37(da) ADB. Oleh itu, di mana tiada pengetahuan dibangkitkan sebagai pembelaan dan tertuduh gagal untuk membuktikan pembelaannya atas imbangan kebarangkalian, dia harus sebagai undang-undang disabitkan atas kesalahan yang dipertuduhkan, iaitu pengedaran.

(1)(b) Perayu telah dipanggil untuk menjawab pertuduhan pengedaran dan bukan atas pertuduhan milikan. Pembelaannya mesti diarahkan menyangkal anggapan pengedaran dan bukan untuk cuba meyakinkan mahkamah yang dia bukan mempunyai milikan dengan alasan bahawa dia tidak mempunyai pengetahuan berkenaan dadah tersebut. Tetapi, oleh kerana dia memilih untuk meletakkan pembelaan tidak mempunyai pengetahuan, dia harus membuktikannya atas imbangan kebarangkalian. Jika tertuduh gagal untuk menyangkal anggapan pengetahuan, soalan sama ada dia berjaya dalam menyangkal anggapan pengedaran tidak berbangkit sama sekali.

(2) Melainkan jika ia boleh ditunjukkan bahawa pihak pendakwaan telah didorong oleh motif serong dan menahan keterangan yang memihak kepada perayu daripada diketahui, tanggapan bertentangan tidak boleh dibuat terhadap pihak pendakwaan. Tiada cadangan sebegitu dibuat

dalam kes ini. Lebih penting lagi, walau pun tanpa keterangan Ofelia, pihak pendakwaan mempunyai keterangan yang boleh dipercayai yang mencukupi untuk membuktikan kes *prima facie* terhadap perayu pada penutupan kesnya. Dari segi undang-undang, tiada tanggapan bertentangan boleh dibuat terhadap pihak pendakwaan atas kegagalan memanggil saksi apabila pihak pendakwaan telah melepaskan bebannya.

(3) Tiada manfaat dalam aduan bahawa hakim bicara telah gagal mempertimbangkan penjelasan pembelaan dengan teliti. Hakim bicara telah mengambil kira dengan penuh penjagaan dan teliti setiap aspek material penjelasan pembelaan. Oleh itu, tiada merit dalam rayuan perayu.

Case(s) referred to:
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Baharom v. PP [1960] 1 LNS 9 HC ***(refd)***
Chan Pean Leon v. PP [1956] 1 LNS 17 HC ***(refd)***
Chu Tak Fai v. PP [1998] 4 CLJ 789 CA ***(refd)***
Chua Keem Long v. PP [1996] 1 SLR 510 ***(refd)***
Cohen Lorraine Philis & Anor v. PP [1989] 2 CLJ 956; [1989] 1 CLJ (Rep) 18 SC ***(refd)***
Emmanuel Yaw Teiku v. PP [2006] 3 CLJ 597 FC ***(refd)***
Isidro Leonardo Quito Cruz v. PP [2013] 2 CLJ 1025 FC ***(refd)***
Leow Nghee Lim v. Regina [1955] 1 LNS 53 HC ***(refd)***
Liew Siew & Anor v. PP [1969] 1 LNS 90 HC ***(refd)***
Mat v. PP [1963] 1 LNS 82 HC ***(refd)***
Muhammed Hassan v. PP [1998] 2 CLJ 170 FC ***(refd)***
Ng Chai Kem lwn. PP [1994] 2 CLJ 593 SC ***(refd)***
Ng Eng Kooi & Anor v. PP [1970] 1 LNS 86 FC ***(refd)***
Ong Hooi Beng & Ors v. PP [2015] 1 LNS 63 CA ***(refd)***
Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(refd)***
PP v. Yuvaraj [1968] 1 LNS 116 PC ***(refd)***
PP v. Zulkifli Arshad [2010] 6 CLJ 121 FC ***(refd)***
Siew Yoke Keong v. PP [2013] 4 CLJ 149 FC ***(refd)***
Toh Ah Loh & Mak Thim v. Rex [1948] 1 LNS 72 HC ***(refd)***
Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 12(2), 37(d), (da)(xvi), 37A(1)(b), 39A
Evidence Act 1950, ss. 9, 114(g)
Misuse of Drugs Act 1973 [Sing], s. 15(c)

For the appellant - Mohd Osman Ibrahim; M/s Osman Ibrahim & Co
For the respondent - Samihah Rhazali; DPP

[Editor's note: For the High Court judgment, please see PP v. Ling Haw Cheun [2014] 1 LNS 846.]

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Rahman Sebli JCA:

The Charge

[1] In the High Court at Sibu, Sarawak, the appellant was charged with trafficking in a dangerous drug and the charge against him was as follows:

> Bahawa kamu pada 25.7.2012 jam lebih kurang 09.20 pagi, bertempat di belakang Vital Focus Transportation Sdn Bhd Terminal Bus, Jalan Pahlawan, Sibu, di dalam Daerah Sibu, di dalam Negeri Sarawak, telah mengedar dadah berbahaya iaitu Methamphetamine seberat 184.88 gram, dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta Dadah Berbahaya 1952.

[2] He claimed trial to the charge at the conclusion of which he was found guilty and sentenced to death. This is his appeal against the conviction. Having heard arguments from both sides we dismissed the appeal by a unanimous decision. These are our grounds for dismissing the appeal. My learned brothers Justice Zawawi Salleh and Justice Idrus Harun have read this judgment and have approved the same.

The Background Facts

[3] The facts are quite straightforward and can be summarised as follows. On 25 July 2012 at about 9.10am, Detective Abdul Yaacub bin Sahari (PW4) and two of his colleagues followed the appellant's car bearing registration No. QSV7800 until it stopped and parked at the parcel section of Vital Focus Transportation ("VFT") located at the bus terminal, Jalan Pahlawan 7B Sibu. There was another person inside the car, a lady by the name of Ofelia. She was the appellant's girlfriend.

[4] On his arrival at the bus terminal, the appellant alighted from the car through the driver's door and proceeded straight to the parcel collection section of VFT. As soon as he reached the counter, he pointed to a box (P12) with the consignment number 213571 which was lying on the floor. He then showed to the clerk on duty (PW3) a text message in his handphone which displayed the consignment number 213571.

[5] PW3 asked the appellant to produce his identity card, which the appellant did, and she duly recorded the identity card number in the company's record book (P11). The appellant himself wrote down his phone number 0109712255 on the record book.

[6] After collecting P12, the appellant headed back towards the car holding the box with both hands. Ofelia was seated at the passenger seat. As the appellant was about to enter the car, PW4 stopped him and introduced himself as a police officer. Startled by the sudden appearance of the police, the appellant threw the box onto the driver's seat of the car.

[7] When PW4 tried to arrest him by holding his hand, the appellant resisted by stiffening his body and hands and tried to step away from the car. He was however detained and handcuffed by PW4 with the assistance of his two colleagues. Ofelia was also arrested. A short while later PW4's superior officer Inspector Lee Beng Oui (PW6) arrived on the scene.

[8] PW6 took out P12 from the car and called both the appellant and Ofelia to witness the inspection of the box. Before that he administered the statutory caution under s. 37A(1)(b) of the Dangerous Drugs Act 1952 ("the DDA"). The appellant then gave his statement (P13) to PW6. The questions and answers proceeded as follows:

S: Adakah kotak itu kamu ambil sendiri di kaunter.

J: Ya.

S: Siapakah pemilik sebenar kotak tersebut?

J: Ah Kiong.

S: Ah Kiong ada bersama kamu?

J: Tiada.

S: Apa yang ada dalam kotak tersebut?

J: Tidak tahu.

[9] The appellant however refused to sign the statement. PW6 then opened the box in the presence of both the appellant and Ofelia. Among the items found in the box was one black plastic bag (P18) containing five transparent plastic packets (P19 (a-e)) containing crystalline substances suspected to be syabu.

[10] At his office after returning from the scene, PW6 weighed the five transparent plastic packets together with the contents and they recorded a gross weight of 253.67g. When asked why he weighed the exhibits, PW6 said it was to classify under which section of the DDA were the arrests made.

[11] The drug exhibits were sent to the Chemistry Department for analysis and were confirmed by the Forensic Science Officer Rubeshan a/l Shamugam (PW7) to contain 184.88g of methamphetamine, a dangerous drug listed in the First Schedule (Part III) of the DDA. There was no challenge to this part of PW7's evidence and no reason was given as to why this was not done. The evidence is therefore deemed to be admitted: *Wong Swee Chin v. PP* [1980] 1 LNS 138; [1981] 1 MLJ 212 FC.

[12] In saying this we are of course mindful of the rule that failure by the defence to put its case to the prosecution witnesses can never, by itself, relieve the prosecution of its duty of establishing the charge against the accused beyond any reasonable doubt: See *Alcontara Ambross Anthony v. PP* [1996] 1 CLJ 705; [1996] 1 MLJ 209.

[13] A person found in possession without lawful authority of 50g or more in weight of this type of drug (methamphetamine) is presumed to be trafficking in the drug "unless the contrary is proved" (s. 37(da)(xvi) of the DDA).

The Defence Case

[14] On these primary facts the learned trial judge found, and rightly so in our view, that a *prima facie* case of trafficking had been established against the appellant. The appellant was then called upon to enter his defence to the trafficking charge. He chose to give sworn evidence. His story was that on the morning of his arrest, he had gone out to the bus terminal together with Ofelia using his brother's car. The purpose of going to the bus terminal was to collect something belonging to Ofelia's friend by the name of "Ah Kiong".

[15] The appellant did not deny collecting P12 from the terminal but claimed that it was at the request of Ofelia who told him that Ah Kiong asked her to collect it. In short he was just doing Ofelia a favour, nothing more nothing less. As to why he threw the box onto the car seat, his explanation was that it was because he was "shocked" when someone suddenly stopped him from behind.

[16] The appellant called his younger brother Ling Haw Hiong (DW2) as a witness but the only significance of his evidence is that the car that the appellant was using that morning "to collect thing" at the bus station belonged to him.

[17] Like in most drug trafficking cases, the appellant's defence was that he had no knowledge of the drug, and not that he was not trafficking in the drug in rebuttal of the presumption under s. 37(da) of the DDA, which applied against him. If his claim is true, ie, that he had no knowledge of the drug, he committed no offence under the DDA, not even the lesser offence of possession under s. 12(2) read with s. 39A because without proof of knowledge, mere physical possession is not a crime. He would be entitled to an outright acquittal.

[18] The defence of no knowledge is therefore a complete defence to a trafficking charge. It is a defence of total avoidance, unlike the defence raised by the accused in *Cohen Lorraine Philis & Anor v. PP* [1989] 2 CLJ 956; [1989] 1 CLJ Rep 18 where possession was admitted but not trafficking. It was a defence of confession and avoidance: confessing to possession but avoiding liability for trafficking.

[19] The thrust of the defence in that case was that the drug was for the accused's own personal consumption and not for the purpose of trafficking. The accused failed in the High Court but succeeded in the Supreme Court where her conviction for trafficking was set aside and substituted with a conviction for possession under s. 39A of the DDA.

[20] This case shows that possession and trafficking are two distinct offences and must be considered in two separate exercises at the close of the defence case. A person who trafficks must necessarily be in possession of the drug but a person who is in possession need not necessarily be trafficking in the drug. Where the accused succeeds in rebutting the presumption of trafficking but possession remains proved or is admitted, he can only be convicted of the offence of possession.

The Appeal

[21] Before us the appellant advanced 11 grounds of appeal but in our view they can be compressed into three broad grounds, firstly that the learned trial judge erred in finding that knowledge had been proved, secondly that the learned trial judge erred in failing to draw adverse inference against the prosecution for failing to call Ofelia, and thirdly that the defence explanation was not "thoroughly" considered by the learned trial judge.

First Ground

[22] Basically the appellant's argument in relation to the first ground is that since knowledge was not proved, the appellant was not in *mens rea* possession of the drug, and since he was not in *mens rea* possession of the drug, he could not be presumed to be trafficking under s. 37(da) of the DDA. Therefore the learned trial judge was wrong in invoking the presumption of trafficking. The equation cannot be simpler than that.

[23] Whether or not the appellant had knowledge of the drug is primarily a question of fact for the trial judge to determine. In this regard the learned trial judge's finding was that the appellant had knowledge of the drug and was therefore in actual or *mens rea* possession of the drug. We have no reason to disturb this finding of fact. It is clear that her finding is amply supported by the evidence.

[24] There is no dispute that the drug was in the appellant's physical custody and control at the time of his arrest. This established the first of the twin elements of "possession" as the word is understood in criminal law: *Chan Pean Leon v. PP* [1956] 1 LNS 17; *Toh Ah Loh & Mak Thim v. Rex* [1948] 1 LNS 72; [1949] 1 MLJ 54; *Leow Nghee Lim v. Regina* [1955] 1 LNS 53.

[25] As for the second element of possession, which is knowledge of the thing possessed, the learned judge's finding was based on inferences from the following acts and conduct of the appellant:

(a) the appellant straightaway pointed to the box P12 which was lying on the floor of the VFT counter.

(b) the appellant himself wrote down his phone number on the record book P11.

(c) the appellant threw the box on the driver's seat of the car upon being approached by the police.

(d) the appellant stiffened his hands whilst stepping backwards away from the car.

[26] On such evidence before her, the learned trial judge was perfectly entitled to arrive at the finding of knowledge. The combined effect of these strands of evidence is that the appellant knew about the drug. Learned counsel for the appellant submitted that the appellant's conduct of stiffening his body and hands and moving to the rear of the car in order to get away cannot be held against the appellant as it was an "exaggeration" and "not corroborated" by other evidence. With due respect to learned counsel the submission is without any legal or factual basis.

[27] The learned trial judge rightly referred to the Federal Court decision in *Parlan Dadeh v. PP* [2009] 1 CLJ 717 for the proposition that it is not for the court to explain away the accused's conduct by offering an explanation which is consistent with the innocence of the accused. The explanation must come from the accused himself as required by s. 9 of the Evidence Act 1950 ("the Evidence Act").

[28] As actual possession (as opposed to presumed possession) had been proved against the appellant, the learned trial judge was therefore correct in invoking the presumption of trafficking under s. 37(da). In fact she had no discretion not to do so as the weight of the drug exceeded the minimum prescribed by s. 37(da)(xvi) of the DDA: See *PP v. Zulkifli Arshad* [2010] 6 CLJ 121 ("*Zulkifli Arshad*") where the Federal Court said at p. 131:

> We are of the view that having been established as a fact by the trial judge that there was actual possession of the drugs by the respondent, the weight of which exceeded 200 grams of cannabis, then the statutory presumption under s. 37(da)(vi) must come into play since it provides:
>
> (da) any person found in possession of ...
>
> (vi) 200 grams or more in weight of cannabis;
>
> other than in accordance with the authority of this Act or any other written law, **shall be presumed, until the contrary is proved, to be trafficking** in the said drug.
>
> (emphasis added.)

[29] In that case, despite actual possession of more than 200g of cannabis having been proved against the accused, both the High Court and the Court of Appeal failed to invoke the presumption under s. 37(da) of the DDA. This prompted the Federal Court to make the following remarks at p. 133:

> The same applies to the failure of the Court of Appeal for not applying the presumption under section 37(da)(vi). Be that as it may, we feel that on the evidence adduced by the prosecution, and upon the failure by the learned trial judge as well as the Court of Appeal to invoke the presumption, **it is incumbent upon us to do so in accordance with the provision of s. 37(da)(vi) of the Act**. (emphasis added)

[30] It is clear from the judgment that once the factum of possession of more than the prescribed amount of scheduled drug has been proved, it is "incumbent" on the court to invoke the presumption of trafficking. What it

means in simple language is that the court must invoke the presumption. If it is incumbent on the Federal Court, it is incumbent on all courts below the Federal Court. There can be no argument that this part of the apex court's decision forms part of the *ratio decidendi* of the case. To omit invoking the presumption would be to violate the doctrine of *stare decisis*.

Whether Presumption Of Knowledge To Be Invoked

[31] Given the fact that actual custody and control had been proved against the appellant, the question is whether it was incumbent on the court, including this court, to invoke the presumption of knowledge under s. 37(d). It is important to note that there are two parts to s. 37(d). The first presumes "possession" and the second presumes knowledge as to the nature of the drug. We reproduce below the relevant part of the provision:

> (d) any person who is found to have in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in **possession** of such drug and shall, until the contrary is proved, be deemed to have **known the nature** of such drug. (emphasis added)

[32] It can be seen at once that the presumption under the second part is more specific and is couched in stronger language than the presumption in the first part, which merely presumes "possession". The effect of the second part of the presumption is that a person who is found in custody or control of any proscribed drug is presumed, until the contrary is proved, to have known the nature of the drug. Weight is not a factor.

[33] We venture to say that the presumption of "possession" in the first part of s. 37(d) makes no sense because possession as mentioned earlier consists of two elements, namely physical possession and knowledge of the thing possessed. It is absurd to presume the physical element of possession because a person who is found in physical custody or control of the drug would already be in physical possession of the drug.

[34] It is the second part of s. 37(d) that actually presumes "possession" because by being presumed to have had knowledge of the nature of the drug, the person found in custody or control of the drug would then be in *mens rea* possession of the drug, the physical element being physical custody or control and the mental element being knowledge as to the nature of the drug, which the law presumes.

[35] Can the first and second parts of s. 37(d) be read in one breadth, meaning to say, since the accused is deemed to be in "possession" of the drug upon proof of custody or control, he is then deemed, for the second time, to have had knowledge of the nature of the drug? We do not think so because that will be a presumption upon presumption and will offend the rule against double presumption.

[36] We appreciate that the Federal Court in *Zulkifli Arshad* was dealing with the presumption of trafficking under s. 37(da) and not the presumption of knowledge under s. 37(d) but in our view the *ratio decidendi* extends to the presumption under s. 37(d). It is to be noted that the operative words in both s. 37(d) and s. 37(da) are similar word for word, ie, "until the contrary is proved". A B

[37] The effect of these words is that unless and until the accused discharges his burden of proof, the court must act on the supposition that the presumed facts are true. It is a supposition of law and as such it is not open to the judge nor the Public Prosecutor to choose whether to invoke or not to invoke the presumptions and this is so even where there is actual evidence of knowledge or trafficking. To do so would be to ignore the law. The court's duty is to give effect to the law, not to stifle it or to give it a construction that will defeat its object. C

[38] This in our humble and respectful opinion, answers the view that the statutory presumptions are there merely as an aid to the prosecution and as such it is entirely up to the prosecution to decide whether or not to call the presumptions in aid in support of its case. D

[39] If Parliament had intended to give the court the discretion whether to invoke or not to invoke the presumptions once the facts that trigger their activations are established, it would have used the word "may" instead of "shall" in both s. 37(d) and s. 37(da). Such word can be found in many statutes. One example that comes to mind is s. 114 of the Evidence Act which deals with the drawing of inferences. E

[40] The use of the word "shall" immediately preceding the words "until the contrary is proved" in both s. 37(d) and s. 37(da) dispels any notion that the court is vested with such discretion. Chong Siew Fai CJ (Sabah and Sarawak) in *Muhammed Hassan v. PP* [1998] 2 CLJ 170 FC ("*Muhammed Hassan*") aptly described the presumptions as "compelling presumptions" which must be invoked. F G

[41] Having regard to the legislative scheme of ss. 37(d) and (da), we are of the view that in drug trafficking cases both presumptions are applicable side by side, provided the facts that trigger their applications are established at the close of the prosecution's case. What the law prohibits is to use the presumption of "possession" under s. 37(d) to invoke the presumption of trafficking under s. 37(da). H

[42] It is to be noted that the factual elements that trigger the application of these two presumptions are different. The presumption of knowledge under s. 37(d) is triggered by proof of custody or control whereas the presumption of trafficking under s. 37(da) kicks in by proof of possession. It is clear that these two presumptions apply independently of each other and must therefore be applied independently upon proof of the facts that trigger their applications. I

[43] It will be a strange working of the law if, despite being imposed by law to rebut a statutory presumption, the accused is relieved of such legal burden by the court deciding not to invoke the presumption merely because there is actual evidence of the fact presumed. That will effectively render the statutory presumption otiose and expose the Legislature to speculation that it had enacted the law without any rhyme or reason. That cannot be the case. As is often said, Parliament does not legislate in vain. The intention behind the statutory presumption is obvious, and that is to reverse the onus of proof.

[44] The practice by the prosecution of choosing either to invoke the presumption under s. 37(d) or the presumption under s. 37(da) probably stems from the decision in *Muhammed Hassan* which held that the presumption of "possession" under s. 37(d) cannot be used to invoke the presumption of trafficking under s. 37(da). In other words, the presumption of trafficking under s. 37(da) can only be invoked by affirmative evidence of possession and not by using the presumption of "possession" under s. 37(d).

[45] The new s. 37A which came into force on 15 February 2014 seems designed to obviate this dilemma of choice faced by the prosecution. It provides as follows:

> 37A. Notwithstanding anything under any written law or rule of law, a presumption may be applied under this Part in addition to or in conjunction with any other presumption provided under this Part or any other written law.

[46] It is interesting to note that the Republic of Singapore has a similar but differently worded provision which has been in existence long before *Muhammed Hassan* was decided. Section 15(c) of the Singapore Misuse of Drugs Act 1973 provides:

> 15. Any person who is **proved or presumed** to have had in his possession more than
>
> (a) ..
>
> (b) ..
>
> (c) 2 grammes of diamorphine (morphin) contained in any controlled drug:
>
> (d) ..
>
> shall, until the contrary is proved, be presumed to have had such controlled drug in his possession for the purpose of trafficking therein." (emphasis added)

[47] The decision in *Muhammed Hassan* must be understood in its proper context. First of all the Federal Court in that case was dealing with the presumption of possession in the first part of s. 37(d) without touching on the second part.

[48] More importantly the court did not decide that where the presumption of trafficking under s. 37(da) has been invoked by affirmative evidence of possession and not by using the presumption of possession under s. 37(d), the presumption of knowledge as to the nature of the drug under the second part of s. 37(d) ceases to have effect and becomes a dead letter of the law.

[49] There is also nothing in the judgment to say that where the presumption of knowledge as to the nature of the drug under s. 37(d) has been triggered by proof of custody or control, the court can choose whether to invoke or not to invoke the presumption. In fact the judgment suggests otherwise.

[50] We are mindful of the Federal Court decisions in *Emmanuel Yaw Teiku v. PP* [2006] 3 CLJ 597; *Isidro Leonardo Quito Cruz v. PP* [2013] 2 CLJ 1025; [2013] 2 MLJ 1 and *Siew Yoke Keong v. Pendakwa Raya* [2013] 4 CLJ 149; [2013] 3 MLJ 630 where certain passages in the judgments seem to suggest that where there is actual evidence of knowledge or trafficking, there is no need to invoke the presumptions under s. 37(d) or s. 37(da), as the case may be.

[51] We have gone through the judgments carefully and we find that the crux of the decisions where they touch on s. 37(d) and s. 37(da) was basically to reaffirm the rule against double presumption as decided in *Muhammed Hassan*, ie, that the presumption of possession under s. 37(d) cannot be used to invoke the presumption of trafficking under s. 37(da). We do not think the *ratio decidendi* of the cases go beyond that.

[52] With due respect, they are not authorities for saying that where the facts that trigger the presumptions under s. 37(d) or s. 37(da) have been established, the court can choose whether to invoke or not to invoke the presumptions. If at all, the observations made by the Federal Court on s. 37(d) and s. 37(da) are at best *obiter* because it was unnecessary for the court to decide whether it was incumbent on the court to invoke the statutory presumptions when facts triggering their activations have been established. The authority that is directly on point is the Federal Court decision in *Zulkifli Arshad*.

[53] In *Emmanuel Yaw Teiku (supra)* the following passage can be found at para. 14 of the judgment delivered by Richard Malanjum FCJ (now CJ of Sabah and Sarawak):

> Hence, under the Act there is no mandatory rule to require for the invocation of s. 37(d) to establish the element of possession on a charge for trafficking of dangerous drug. Where the facts and circumstances warrant, it would be sufficient to establish actual possession *cum* knowledge from the totality of the evidence adduced.

[54] This passage must not be understood to mean that it is not mandatory to invoke the presumption of knowledge under s. 37(d) upon proof of custody or control. All that it says is that it is not necessary to invoke the presumption

under s. 37(d) to establish possession. It must be a reference to the presumption of possession in the first part of s. 37(d) as it was obviously made in the context of the rule against double presumption as decided in *Muhammed Hassan*.

[55] If it is incumbent on the court to invoke the presumption of trafficking upon proof of actual possession as decided in *Zulkifli Arshad*, it must likewise be incumbent on the court to invoke the presumption of knowledge as to the nature of the drug upon proof of actual custody or control.

Burden To Prove Defence Of No Knowledge

[56] The question of whether the presumption of knowledge under s. 37(d) must be invoked upon proof of custody or control is of critical importance as it relates to the fundamental question of burden and quantum of proof and how the court should deal with the defence of no knowledge, if raised. The fact that it is a defence that is most commonly raised in drug trafficking cases underscores the importance of determining the true import of s. 37(d).

[57] If the presumption under s. 37(d) applies and is duly invoked by the court, the accused bears the legal (as opposed to evidential) burden of proving absence of knowledge on the balance of probabilities by admissible evidence: *PP v. Yuvaraj* [1968] 1 LNS 116; [1962] 2 MLJ 189 PC (See also *Baharom v. PP* [1960] 1 LNS 9; [1960] MLJ 429; *Liew Siew & Anor v. PP* [1969] 1 LNS 90; *Chu Tak Fai v. PP* [1998] 4 CLJ 789).

[58] If on the other hand the presumption does not apply, for example where the court decides not to invoke the presumption, the accused will be relieved of the legal burden of proving absence of knowledge. In fact he has no duty to prove or to disprove anything. To earn an acquittal, all that he needs to do is to merely raise a reasonable doubt in the court's mind as to the truth of the prosecution's case. This is settled jurisprudence and *Mat v. PP* [1963] 1 LNS 82; [1963] MLJ 263 is the *locus classicus* on the point.

[59] The distinction between a legal and evidential burden of proof has always been there and failure to apply the correct burden can result in a serious miscarriage of justice. In *Oxford Dictionary of Law Seventh Edition*, the distinction is explained in the following terms:

> A distinction is drawn between the persuasive (or legal) burden, which is carried by the party who as a matter of law will lose the case if he fails to prove the fact in issue; and the evidential burden (burden of adducing evidence or burden of going forward), which is the duty of showing that there is sufficient evidence to raise an issue fit for the consideration of the trier of fact as to the existence or non existence of a fact in issue.

[60] The practical effect of the distinction in the context of a criminal case is demonstrated by the Privy Council decision in *Yuvaraj (supra)* where Lord Diplock delivering the advice of the Judicial Committee said that the consequence of a failure to rebut a statutory presumption of fact which forms a necessary factual ingredient of the offence would be a conviction. This is how His Lordship put it:

> Generally speaking, no onus lies upon a defendant in criminal proceedings to prove or disprove any fact: it is sufficient for his acquittal if any of the facts which if they existed would constitute the offence with which he is charged are "not proved". But exceptionally, as in the present case, an enactment creating an offence expressly provides that if other facts are proved, a particular fact, the existence of which is a necessary factual ingredient of the offence, shall be **presumed or deemed** to exist "unless the contrary is proved". **In such a case the consequence of finding that that particular fact is "disproved" will be an acquittal, whereas the absence of such finding will have the consequence of a conviction**. (emphasis added)

[61] The case had been cited with approval by the Federal Court in *Ng Eng Kooi & Anor v. PP* [1970] 1 LNS 86; [1970] 1 MLJ 267 and *PP v. Abdul Rahman Akif* [2007] 4 CLJ 37 and by the then Supreme Court in *Cohen Lorraine Philis v. PP (supra)* and *Ng Chai Kem lwn. PP* [1994] 2 CLJ 593. In *Cohen Lorraine Philis* the Supreme Court recognised that the law on statutory presumptions as stated in *Yuvaraj* has become "part of our law".

[62] In a drug trafficking charge, clearly knowledge is a necessary factual ingredient of the offence. Without proof of knowledge, there can be no possession in the criminal sense and without proof of possession there can be no trafficking. For all intents and purposes, the defence of no knowledge is a defence that the accused was not even in possession of the drug. The defence has nothing to do with rebutting the presumption of trafficking under s. 37(da). Therefore, where no knowledge is raised as a defence and the accused fails to prove the defence on the balance of probabilities, he must as a matter of law be convicted of the offence charged, which is trafficking.

[63] This has to be the consequence because by failing to rebut the presumption of knowledge under s. 37(d) and by adducing no evidence to prove that the drug was not for the purpose of trafficking, the accused necessarily fails to rebut the presumption of trafficking under s. 37(da). To succeed in rebutting the presumption of trafficking, the accused must first admit to possession and then prove that the drug in his possession was not for the purpose of trafficking, as was done by the accused in *Cohen Lorraine Philis (supra)* and the accused in *Isidro Leonardo Quito Cruz (supra)*, to cite just two cases.

[64] Having said that we must hasten to add that he is still entitled to be acquitted of the trafficking charge if his explanation succeeds in raising a reasonable doubt in the prosecution's case on any other essential ingredient of the charge other than the facts presumed by s. 37(d) and s. 37(da), such as whether the drug was in his custody or control, the weight of the drug, the nature of the drug, the identity of the drug, or even his own identity. These are facts that are not presumed by the law and therefore the burden of proof is the lighter evidential burden of merely to cast a reasonable doubt in the prosecution's case: *Mat v. PP (supra)*.

[65] In the instant case it must be remembered that the appellant was called upon to answer a trafficking charge and not a possession charge. His defence must therefore be directed at rebutting the presumption of trafficking rather than to try to convince the court that he was not in possession by reason of having no knowledge of the drug. But since he chose to put up the defence of no knowledge, then he must prove it on the balance of probabilities.

[66] In *Abdul Rahman Akif (supra)* the Federal Court in allowing the prosecution's appeal and reinstating the conviction and death sentence passed by the High Court found that since the respondent did not offer any explanation whatsoever to rebut the presumption of trafficking under s. 37(da), the presumption therefore stood unrebutted.

[67] In our view the same consequence should follow where there is a failure to rebut the presumption of knowledge under s. 37(d) in cases where the defence to the trafficking charge is a defence of no knowledge. If the accused fails to rebut the presumption of knowledge, the question of whether he succeeds in rebutting the presumption of trafficking does not arise at all.

Second ground

[68] It was submitted that an adverse inference under s. 114(g) of the Evidence Act ought to be drawn against the prosecution for failing to call Ofelia as a witness. We do not find any merit in the argument. In *Ong Hooi Beng & Ors v. PP* [2015] 1 LNS 63; [2015] 3 AMR 449 this court made the following observations at p. 446 (MLJ):

> As the burden of proof lies with the prosecution, it is entirely for the prosecution to decide whom to call and whom not to call as a witness subject of course to its overriding duty to conduct the prosecution with utmost candour and fairness. If the prosecution knows that a particular witness from whom a statement has been recorded has not told the truth, will not tell the truth and will in fact lie to the court, there is no point in calling such witness. In fact to do so would be to pervert the course of justice.

[69] Unless it can be shown that the prosecution was actuated by oblique motive and was suppressing evidence favourable to the appellant, no adverse inference should be drawn against the prosecution. There was no such suggestion in this case. More importantly, even without the evidence of Ofelia, the prosecution already had sufficient credible evidence to establish a *prima facie* case against the appellant at the close of its case.

[70] In law no adverse inference can be drawn against the prosecution for failure to call a witness when the prosecution has discharged its burden. As Yong Pung How CJ said in *Chua Keem Long v. PP* [1996] 1 SLR 510 at 523-524:

> The appellant's contention is that the failure of the prosecution to adduce evidence of those other gamblers meant that the court could presume that the evidence would have gone against the prosecution, that there is no such visits.

> Such arguments are commonly made. Commonly too, such arguments are without merit. The court must hesitate to draw any such presumption unless the witness not produced is essential to the prosecution's case. Any criminal transaction may be observed by a number of witnesses. It is not necessary for the prosecution to produce every single one of those witnesses. All the prosecution need to do is to produce witnesses whose evidence can be believed so as to establish the case beyond reasonable doubt. Out of a number of witnesses, it may then only be necessary to bring in one or two; as long as those witnesses actually produced are able to give evidence of the transaction, there is no reason why all the rest should be called, nor why any presumption should be drawn that the evidence of those witnesses not produced would have been against the prosecution.

Third Ground

[71] The appellant's complaint under this ground is that the learned trial judge failed to consider the defence explanation "thoroughly". Having gone through the record of appeal and the grounds of judgment at pp. 206-219, we found no substance to the complaint. It is clear that the learned judge had considered with meticulous care every material aspect of the defence explanation at the end of which she concluded as follows:

> [57] In the face of cogent evidence from the prosecution that (i) the accused had pointed to the box P.12 before he showed the consignment number in the hand phone to PW3 (ii) the accused had collected P.12 and carried it to the car (iii) the accused had thrown P.12 on to the driver's seat upon being detained by the police (iv) the accused tried to get away when detained and (iv) the evidence of the accused and DW2 that the accused having merely collected P.12 on behalf of Ah Kiong at the behest of Ofelia was an afterthought and improbable, I found and held that the defence had not succeeded in rebutting, on a balance of probabilities, the presumption of trafficking in section 37(da) of the DDA 1952.

[72] For all the reasons aforesaid, we found no merit in the appellant's appeal. Accordingly we dismissed the appeal and affirmed the conviction and death sentence imposed by the High Court.